the cause of that effect, even though the cause is not itself interstate commerce.[56] If the Supreme Court agrees with the economic data of the Interstate Commerce Commission, it will no doubt uphold the validity of the latter's order to increase intrastate rates to the level of interstate rates. The question of discrimination is not even relevant. The *Long Island R. R. and Staten Island Rapid Transit Co.* case[57] presents more difficulty, for here the volume of interstate business is negligible. The court might well make an exception of such a situation.[58] If the interstate business is so small, there probably exists no *imperative* economic reason for raising the intrastate rates. On the other hand if such an increase is desirable from an economic standpoint, the power of Congress through the federal Commission to order the increase seems clear. Judicial approval of increasing federal power, based on economic necessity, has practically deprived the states of their rate-making functions.

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THE BREACH IN LIMINE DOCTRINE.—In contracts breaches may occur at the outset or after part performance. To the former the late Professor Langdell applies the term breach *in limine*,[1] and lays down the harsh rule that such a breach, however slight, bars recovery; or stated in other terms, a plaintiff must, as a condition precedent, show that he has not broken his promise at the very outset. The whole doctrine would not warrant a treatment were it not for the fact that it is so widely taught in law schools. The purpose of this note is to discuss the doctrine in its theoretical aspects and also to review the authorities upon which the doctrine is supposedly based.

Langdell cites many cases in which there was a breach *in limine*[2] but the court after inquiring into the materiality of the breach allowed a recovery. He laments the fact that the court entered into such an inquiry. For instance, in *Richie* v. *Atkinson*,[3] the plaintiff promised to ship a full cargo of goods from Sweden to England, but actually carried considerably less. The defendant was sued for his refusal to accept less than complete performance and judgment was rendered against him, because the plaintiff substantially performed his promise and the defendant had his remedy by counterclaim. This was a true breach *in limine*. Langdell says that the decision can be sustained only by inferring from the construction of the contract that full performance was not a condi-

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[56] In *United States* v. *Ferger* (1919) 250 U. S. 199, 39 Sup. Ct. 445, the court held that Congress had the power to punish the use of a fictitious interstate bill of lading, even though such a bill related to no actual or contemplated commerce. The court said that it is untrue "that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt" with instead of by the relation of that subject to commerce and its effect upon it. The power of Congress must include authority to deal "with a host of other acts, which, because of their relation to and influence upon interstate commerce, comes within the power of Congress to regulate, although they are not interstate commerce in and of themselves."

[57] See, *supra*, footnote 47.

[58] In *Fort Smith & W. R. R.* v. *Mills* (1920) 253 U. S. 206, 40 Sup. Ct. 526, the Supreme Court held that the Adamson Law, U. S. Comp. Stat. (1916) §§ 8680a-8680d, did not forbid the doing of work by railroad employees at a lower price than that set forth in the act, in the case of an insolvent road which was unable to pay its way. Here, the employees, appreciating the situation, were desirous of keeping on at the old rates fixed by agreement. This case shows that the Supreme Court will make exceptions to the general rule where economic necessity requires it.

[1] Langdell, *Contracts* (1880) 209-219.

[2] Langdell., *op. cit.* 215; *Clipsham* v. *Vertue* (1869) 5 Q. B. 265; *Tarrabochia* v. *Hickie* (1856) 1 H. & N. 183; *MacAndrew* v. *Chapple* (1866) L. R. 1 C. P. 643.

[3] (1808) 10 East 295.

tion precedent to recovery.[4] It is clear, however, that the court did not concern itself with a construction of the contract but was dealing solely with conditions implied in law, deciding that it would be unjust to require exact performance as a condition precedent to recovery even though the plaintiff broke his promise at the very outset.

Langdell cites the case of *Hoare* v. *Rennie*[5] to support his theory. In that case the plaintiff was to ship 667 tons of goods in equal instalments for four months, having the option of commencing in either May or June. He shipped about 20 tons in June, but when the cargo arrived the defendant knew that the plaintiff had shipped no other cargoes in June and refused to receive it. The plaintiff demurred to the defendant's plea which alleged a breach, but not a material breach, by the plaintiff and the court overruled the demurrer. It is clear that there was no breach *in limine* here because shipment by the plaintiff of 20 tons in June was not in breach of his promise but rather in performance of it. It was only the plaintiff's failure to make subsequent shipments during the month of June that constituted a breach. The decision in *Hoare* v. *Rennie* was questioned in *Jonassohn* v. *Young*[6] and was expressly overruled in *Simpson* v. *Crippen,*[7] a case almost identical in its facts.

Some have considered *Norrington* v. *Wright*[8] as a case of breach *in limine.* The plaintiff agreed to sell and deliver 5000 tons of iron in 1000-ton monthly instalments beginning in February. In that month he delivered 400 tons which the defendant accepted and paid for. During the next two months the plaintiff shipped 880 and 1571 tons respectively but these shipments the defendant rejected. This case does not sustain the breach *in limine* theory (1) because there was no breach at the outset; (2) because the decision rests solely upon the ground that the breach was a material one since time is of the essence in commercial contracts.[9] Even the case of *Wells* v. *Calnan*[10] has been used to support the theory of Langdell. In that case, after the contract for the sale of the plaintiff's premises, but before time for performance, the buildings were demolished by fire without the plaintiff's fault. The plaintiff tendered a deed of the depleted premises, which the defendant refused. It is clear that the plaintiff never broke his promise and no action could be maintained against him by the defendant.

Professor Williston, under the paragraph heading,[11] "A breach *in limine* as to time is fatal in contracts of sale", cites a number of cases[12] to support the doctrine; but the decisions all rest upon the ground that a seller's failure to perform on time is a material breach. In these cases the court decided as a matter of law that such a breach was material when on sound principle it would seem that the question, being solely one of fact, should be left to the jury unless absolutely clear. There is abundant authority to sustain the proposition that the

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[4] Langdell, *op. cit.* 214.
[5] (1859) 5 H. & N. 19.
[6] (1863) 4 B. & S. 295.
[7] (1872) L. R. 8 Q. B. 14.
[8] (1885) 115 U. S. 188, 6 Sup. Ct. 12.
[9] Prof. Williston so considers the doctrine of the case. See 2 Williston, *Contracts* (1920) 1624, footnote 72. Prof. Williston further says, "In installment contracts, certainly, exact performance of every installment on the day has not generally been thought a condition precedent to liability of the other party." pp. 1623 & 1624, *supra.* Such is the law of the Uniform Sales Act § 45.
[10] (1871) 107 Mass. 514.
[11] Williston, *op. cit.* 1622, § 847.
[12] *Oshinsky* v. *Loraine Mfg. Co.* (C. C. A. 1911) 187 Fed. 120; *Jones* v. *U. S.* (1878) 96 U. S. 24; *Bank of Columbia* v. *Hagner* (1828) 1 Pet. 455; *Howe* v. *Smith* (1884) 27 Ch. D. 89; *Hill* v. *Fisher* (1852) 34 Me. 143.

materiality of a breach after part performance is for the jury, and there is no reason why this rule should not likewise be applied to breaches *in limine*. The stringent rule that a seller's failure to deliver at the specified time involves a material breach has not been applied to a buyer's failure to pay at the specified time,[13] and the Uniform Sales Act, § 60 so codifies the law. While it is unquestionably true that a buyer's failure to perform on the day is usually less important than a similar default by the seller, it does not follow that a seller's default is always so material as to preclude recovery. It should be remembered, however, that courts which consider a seller's default in time material do not accept the breach *in limine* rule.

Up to this point, the view of the law courts has been given, and it now remains to consider the view of courts of equity. It is well known that equity gives relief to a plaintiff who has not fully performed his promise, the decree being conditional upon the plaintiff's allowing the defendant compensation for his breach. Thus where a plaintiff could not convey all that he contracted to convey,[14] or where there were slight incumbrances[15] upon his property, or where the property was not offered in the condition to which the buyer was entitled,[16] or where there was a breach as to time of performance,[17] the plaintiff was allowed to recover. It is only where the breach is clearly material that equity will deny relief.[18]

Turning now to the theoretical basis of the breach *in limine* rule, it seems that it has its origin in an inequitable, dogmatic absolutism that misconceives the very purpose of contracting. If the sole motive and purpose of forming contract relationships were to inflict penalties, the doctrine could readily be accepted; but the motive in forming such relationships in the economic world is to derive mutual benefit. If courts are to reflect a sound economic policy, they should allow one to recover who has done substantially what he has promised to do, and who has, therefore, substantially conferred upon a defendant what the latter expected. The breach *in limine* rule allows a defendant to escape the consequences of his bargain when the plaintiff commences with a breach, however slight, and under circumstances where the defendant has been tendered essentially what he once wanted and bargained for. The result is inequitable and economically unsound.

In equity, the doctrine of substantial performance has been universally applied and there is no reason why a law court cannot adopt the same rule. It is true that equity can give conditional decrees which will compensate a defendant for any injury that the plaintiff's breach may have caused; but it is equally true that law can also so compensate a defendant, by means of a counterclaim. In fact, a law court is better adapted to deal with the problem, for it has a jury to decide the question of substantial performance and the extent of the defendant's damages in the event that the plaintiff can maintain his action. The rule that substantial performance permits recovery does not mean that plaintiffs are discharged from contract obligations, for a conditional decree

[13] *Strather* v. *Miller* (Ky. 1910) 124 S. W. 358; *Martindale* v. *Smith* (1841) 1 Q. B. 389; *Mirabita* v. *Imperial Ottoman Bank* (1878) 3 Exch. Dic. 164.

[14] *Farris* v. *Hughes* (1893) 89 Va. 930, 17 S. E. 518.

[15] *Capstick* v. *Crane* (1904) 66 N. J. Eq. 341, 57 Atl. 1045.

[16] *Smyth* v. *Sturges* (1888) 108 N. Y. 495, 15 N. E. 544.

[17] *Dresel* v. *Jordan* (1870) 104 Mass. 407; *King* v. *Connors* (1915) 222 Mass. 261, 110 N. E. 289.

[18] *Bergen* v. *Petters* (1911) 144 App. Div. 476, 129 N. Y. Supp. 218, (unreasonable delay by vendor.) Where the defect in quantity or quality is material, equity will not decree specific performance. *Hinckley* v. *Smith* (1872) 51 N. Y. 21; *Bird* v. *Bradburn* (1900) 127 N. C. 411, 37 S. E. 456.

in equity and a counterclaim at law impose penalties upon plaintiffs for failing exactly to perform their promises. The doctrine of substantial performance is more equitable than a rule which gives a defendant a loophole to escape obligations of contract fairly assumed when he has in fact sustained no actual damage and if allowed a counterclaim could only recover nominal damages.

Some who have advocated the breach *in limine* rule would restrict it to cases where the plaintiff can be put in a *status quo*. The objections to such a rule are (1) it opens up unnecessary collateral inquiries; (2) the question properly considered is not whether the plaintiff can be put in a *status quo,* for such an inquiry can only proceed from a misconception of the very purpose of contracting; the inquiry should be, has the plaintiff tendered the defendant essentially what the latter wanted? (3) The *status quo* principle properly applied would lead a court to inquire whether the plaintiff, if denied relief, can make a contract with others upon terms equally favorable to those which the defendant offered. It is impossible for the plaintiff to be returned to a *status quo* unless the market price of the *res* or of the services he contracted to sell to the defendant is the same as or higher than at the time of entering into the original contract. If a plaintiff can thus be returned to a *status quo,* as a practical matter he would never sue since he has sustained no damage. If the *status quo* theory is applied as a physical test or in other words objectively applied, the inquiry will be: has the plaintiff the *res* intact as of the time when the defendant contracted with him. It is true that in many cases the plaintiff still has the *res* as it was when he entered into the contract, but if the demand for the *res* or for the plaintiff's services has ceased, as is exemplified by falling prices, the plaintiff cannot be said to be in the same position he was in originally. (4) Assuming that the plaintiff can dispose of his *res* or his services to others upon terms equally favorable to those of his contract with the defendant, it is clear that the bargain was economically fair and there is no reason why the defendant should refuse to perform when offered essentially what he bargained for and it would not be inequitable to make him pay nominal damages and costs. The breach *in limine* rule so qualified becomes strictly academic as was the whole theory in its origin. (5) Furthermore, there would seem to be no reason for restricting the *status quo* doctrine to breaches *in limine,* for it might as well be applied to breaches after part performance. While it is true that services already rendered cannot be taken back and in most cases goods delivered to a defendant cannot be returned intact to a plaintiff,—when for instance the nature of the goods has been changed in the processes of production,—it is not impossible for a court to inquire whether or not the plaintiff could recover in quasi-contract for services already rendered and goods already delivered the same amount he would recover in contract; and further to determine whether the plaintiff could dispose of his services for the remainder of the contract period or of the remainder of his goods to be delivered under the contract on terms equally favorable to those which the defendant offered. This laborious result would follow from the logical application of the *status quo* principle from an economic standpoint.

In conclusion it must be emphasized that the breach *in limine* rule as originally advanced or even in its more refined form has no confirmation in adjudicated cases. The sound rule should be that a plaintiff who has not materially broken his promise, regardless of the time of breach, should be allowed to recover. Or in other words substantial performance is a condition precedent to his recovery.[19] Law even better than equity can adopt this rule for it has the jury to decide questions of fact. This phase of the law of contracts deals

[19] This rule of course applies only to dependent promises.

with conditions implied in law as distinguished from express conditions which are the creatures of the parties and with the consequences of which a court, not being responsible for their existence, is not concerned. In speaking of conditions implied in law Langdell says, "An implied condition, on the other hand is the creature of the court, and the court is therefore responsible for its consequences. This responsibility rests upon the court not only because an implied condition is its creature, but because, being its creature, the court has the power of moulding it as purposes of justice may require."[20] It is to be hoped and indeed expected that law will conform to equitable principles. While it is unjust to consider every breach of performance in time by the seller material, it is still more unjust to inquire into the mere fact of breach, leaving out of consideration the materiality of the breach, as the doctrine of Langdell would require. The latter rule has no semblance of justice and historically considered finds a proper setting in that period of contract law when implied conditions were unheard of.

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WHEN IS A FOREIGN CORPORATION "DOING BUSINESS" WITHIN THE STATE?—The Court of Appeals of New York has said that the phrases "doing business" and "transacting business" are to be interpreted as having the same meaning.[1] But that court has as yet been unable to furnish the profession with some convenient test as to the meaning of either.

This question has arisen in several ways and it is proposed to examine the cases with a view to extracting from them, if possible, some principles which shall be of aid to the attorney who seeks to advise his corporation client. The General Corporation Law §§ 46, 47 (formerly Section 1780(4) of the New York Code Civ. Proc.) provides that a non-resident or a foreign corporation may serve with process a foreign corporation "doing business within the state". The Court of Appeals in the leading case of *Tauza* v. *Susquehanna Coal Co.*[2] has posited quite succintly that for purposes of jurisdiction a foreign corporation "is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity."[3] If the business of the corporation within the state be both "systematic and regular", service upon such corporation is permitted.[4] And in reaching this conclusion the court was treading upon safe constitutional ground. The Supreme Court had but recently decided that service of this sort was permissible,[5] and had declared that it was no objection to such service that the business of the corporation within the state was solely of an interstate character.[6] In this respect, of course, the application of taxing statutes differs most radically.[7]

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[20] Langdell, *op. cit.* 210.

[1] See *Hovey* v. *De Long Hook & Eye Co.* (1914) 211 N. Y. 420, 426, 105 N. E. 667.

[2] (1917) 220 N. Y. 259, 115 N. E. 915.

[3] *Ibid.*, p. 267.

[4] It must be noted at the outset that "doing business" has a far different connotation as applied to the Corporation and Tax Laws, to be discussed later. Thus, the court says (p. 267) "Activities insufficient to make out the transaction of business within the meaning of these statutes may yet be sufficient to bring the corporation within the state so as to render it amenable to process . . . The question in those cases is not merely whether the corporation is here, but whether its activities are so related to interstate commerce that it may, by a denial of the license, be prevented from being here."

[5] *International Harvester Co.* v. *Kentucky* (1914) 234 U. S. 579, 34 Sup. Ct. 944.

[6] *Ibid.*, p. 588.

[7] *International Text-Book Co.* v. *Pigg* (1910) 217 U. S. 91, 30 Sup. Ct. 481. The evolution of this New York rule is rather interesting. The New York courts originally thought that sufficient jurisdiction was constitutionally obtained over a